

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 25 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JESUS ERNESTO HERNANDEZ-
PEREZ,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 06-74286

Agency No. A97-734-310

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted June 5, 2007
Seattle, Washington

Before: PREGERSON, FERGUSON, and IKUTA, Circuit Judges.

Jesus Ernesto Hernandez-Perez, a native and citizen of Mexico, timely petitions for review of an order of the Board of Immigration Appeals (“BIA”) dismissing his appeal from an Immigration Judge’s (“IJ”) order of removal. The parties are familiar with the facts of this case, and we do not repeat them here,

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

except as necessary to explain our decision. We have jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to consider Hernandez's claims to the extent they raise legal and constitutional issues. We grant the petition and remand to the BIA for proceedings consistent with this disposition.

Hernandez alleges a number of legal errors and due process violations. While many aspects of his hearing might have been conducted differently, we find only one due process violation that requires us to grant his petition.¹ Hernandez contends that the IJ and the BIA, when considering whether his mother would suffer extreme hardship, violated his due process rights by failing to consider psychiatric evidence indicating that his mother would likely attempt suicide were he deported. We agree.²

¹ We reject the government's argument that Hernandez does not have a cognizable due process claim because he is seeking discretionary relief. The government's position is foreclosed by *Fernandez v. Gonzales*, 439 F.3d 592, 602 n.8 (9th Cir. 2006).

² Though we agree with Hernandez's hardship argument with respect to the failure to consider Dr. Wakefield's affidavits, we disagree with his argument that the IJ improperly focused on *past* rather than *future* hardship. The IJ does mention the past hardship experienced by Hernandez's mother and sister when Hernandez spent time in Mexico and during his incarceration. While Hernandez is correct that the proper focus is on future hardship, we cannot say that the IJ erred by using information about past hardship to draw conclusions about the future hardship Hernandez's mother and sister might suffer if Hernandez is removed from the United States.

Due process requires that the agency “review all relevant evidence.” *See Larita-Martinez v. I.N.S.*, 220 F.3d 1092, 1095 (9th Cir. 2000). We presume that the BIA reviews all evidence in the record, and have thus held that “an alien attempting to establish that the Board violated his right to due process by failing to consider relevant evidence must overcome the presumption that it did review the evidence.” *Id.* at 1095-96.

We conclude that Hernandez has overcome this presumption with respect to the affidavits of psychiatrist Dr. John Wakefield. Dr. Wakefield’s diagnosis stated that Hernandez’s mother, Guillermina Avila, suffered from “severe depressive disorder and an acute stress disorder.” In his affidavit, Wakefield was of the opinion that Hernandez’s removal to Mexico would severely affect his mother’s mental health:

[Hernandez’s mother] has a high level of severe anxiety . . . with an on-going preoccupation with her son’s potential deportation. This preoccupation contains a continual conclusion that her life will be over and that she cannot bear life without Mr. Hernandez staying in the United States as part of the family. She believes suicide would be her only alternative if her son were deported. Her demeanor is desperate, agitated and often frantic. . . .

My conclusion is that *as further permanent separation between Mrs. Avila and Mr. Hernandez appears now a possibility, Mrs. Avila is no longer able to remain hopeful and emotionally stable.* She now poses a serious risk of suicide as her health decreases. Her depression is increasing, along with acute anxiety.

In my professional opinion, Mrs. Avila is likely to attempt suicide if her son[,] Ernesto Hernandez, is deported. I would strongly recommend that he be allowed to remain with his family in order to care for his mother. It is outside the scope of my profession to comment on the legal definition of “extreme hardship[,”] however, I conclude that the psychological and emotional hardship Mrs. Avila will endure if Mr. Hernandez’s deportation takes place would be extreme and exceptionally detrimental to her in particular, and the family as a whole.

(emphasis added). Dr. Wakefield also said that Mrs. Avila feels “trapped,” which he believes to be “one of the most dangerous signs for suicide patients.”

Consequently, Dr. Wakefield declared that if Hernandez is removed, he would recommend that his mother be hospitalized.

The evidence in the record indicates that neither the IJ nor the BIA considered Dr. Wakefield’s affidavits. A psychiatrist’s opinion that Hernandez’s mother will “likely . . . *attempt suicide*” is so highly probative of extreme hardship that it is difficult to imagine why both the IJ and the BIA failed to address this evidence specifically. *See, e.g., In re Mendez-Morales*, 21 I. & N. Dec. 296, 303 (BIA 1996) (upholding an IJ’s determination of extreme hardship where the alien’s mother was disabled, had a history of depression, and had attempted suicide). The failure to mention such crucial evidence makes it unlikely that the IJ or BIA actually considered Dr. Wakefield’s affidavits.

In addition to the failure to mention Dr. Wakefield's affidavits, another aspect of the IJ's decision also suggests that the affidavits were not considered. The IJ's decision reflects a misconception about why Mrs. Avila would suffer hardship. As Dr. Wakefield explained in one of his affidavits, it was not the fact of temporary separation, but rather the prospect of a "permanent" separation from her son that would cause Mrs. Avila to "no longer [be] able to remain hopeful" and that would likely trigger a suicide attempt. The IJ, however, never addressed the significance of *permanent* separation. Instead, the IJ noted that Hernandez's mother could visit her permanently deported son in Mexico and could write to him and telephone him.

The BIA's decision likewise does not indicate that it considered Dr. Wakefield's affidavits. In his brief to the BIA, Hernandez argued that "[t]he IJ failed to evaluate the expert psychiatric opinion which establishes the atypically severe psychological effects Respondent's deportation would have on his mother." Despite the fact that Hernandez explicitly drew the BIA's attention to this evidence, the BIA's decision says nothing about Dr. Wakefield's affidavits. Instead the BIA's discussion of whether Hernandez's family would suffer extreme hardship simply concludes that Mrs. Avila did not need financial support from her son, and that the IJ's "factual findings were not clearly erroneous." The BIA's

focus on this different, and clearly less extreme, element of hardship makes it unlikely that it considered Dr. Wakefield's affidavits either.

In sum, given the startling information contained in Dr. Wakefield's affidavits, the IJ's and the BIA's failure to refer to the affidavits, the IJ's misconception about the nature and extent of Mrs. Avila's emotional hardship, and the BIA's mention of only financial hardship, we hold that Hernandez has overcome the presumption that Dr. Wakefield's psychiatric evidence was reviewed by the IJ or the BIA; therefore, Hernandez has established a violation of his due process rights.

To prevail on his due process challenge, Hernandez must also show prejudice. *Larita-Martinez*, 220 F.3d at 1095. The prejudice resulting from the failure to consider the psychiatric evidence of extreme hardship to Hernandez's mother is clear. Extreme hardship is an eligibility requirement for § 212(h) relief, and it is also a factor in the IJ's balance of the equities. *See Mendez-Moralez*, 21 I. & N. Dec. at 301. Dr. Wakefield's opinion is compelling evidence that Hernandez's mother would experience hardship beyond the ordinary consequences of a relative's removal from the United States. Had the IJ considered Dr. Wakefield's views, "the outcome of the proceedings may have been affected."

Colmenar v. I.N.S., 210 F.3d 967, 971 (9th Cir. 2000). Accordingly, we find prejudice.³

Hernandez also alleges a number of other due process and other constitutional violations. In particular, Hernandez challenges the decision to transfer venue from Boise to Seattle,⁴ the treatment of his conviction and *Alford* plea, the admission and exclusion of certain affidavits and testimony, the IJ's consideration of allegedly irrelevant factors such as the use of a false social security number and his juvenile DUI arrest, the IJ's failure to credit him with not being a threat to national security, the IJ's disbelief of his stated reasons for leaving

³ The government argues that Hernandez's decision to permit his removal to Mexico pending appeal undermines his claim of extreme hardship. We disagree. His choice of removal pending appeal over his continued imprisonment has no bearing on the hardship experienced by his relatives.

⁴ The IJ concluded that he lacked jurisdiction to transfer venue back to Boise because of the government's choice of detention location. This was an error. *See Garcia-Guzman v. Reno*, 65 F. Supp. 2d 1077, 1092 (N.D. Cal. 1999) (explaining that "[w]hile it is true that an IJ cannot order the INS to change the place of detention, a motion to change venue is analytically distinct from detention since venue concerns only the place where *hearings* in the case shall take place" (internal citations omitted) (emphasis in original)). Nonetheless, we conclude that Hernandez's statutory right to counsel was not violated, as Hernandez was ably represented by Monica Schurtman and the Legal Aid Clinic of the University of Idaho College of Law. The venue decision also did not violate his right to due process, as it did not deny him a "full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." *Colmenar*, 210 F.3d at 971.

the United States in 1996, and the IJ's failure to keep a complete record of the proceedings. We conclude that any errors relating to these matters do not rise to the level of due process violations.

Thus, we grant Hernandez's petition with respect to his claim that his due process rights were violated by the IJ's and the BIA's failure to consider Dr. Wakefield's affidavits. We deny his petition with respect to his other claims and remand to the BIA for proceedings consistent with this disposition.

PETITION GRANTED AND REMANDED.